

IN THE

MAY 12 1949

Supreme Court of the United States

CHARLES ELLIOTT CROPLEY
CLERK

October Term, 1948.

No. 782

CHARLES C. LOCKARD, RAY MYRE, W. E. ROBERTSON, MATT SMITH, J. L. KING, M. J. FIELDING, HARRY HIRSCHBERG, PAUL SHERMAN, ELECTRICAL ENGINEERING AND MANUFACTURING CO., SAMUEL BRAUNSTEIN, WALTER G. PETERSON, T. A. SLOPER, B. MEYER, JAMES SHEPHERD, OWEN LUNT, FRANK BUSSJAEGER, MAX SCHLOM, CLARENCE FOX, JACOB R. SLATEN and THOMAS P. WALSH.

Petitioners.

CITY OF LOS ANGELES, a Municipal Corporation; CHARLES E. BENNETT, Director of Planning of the Department of City Planning of the City of Los Angeles; WILLIAM H. SCHUCHARDT, S. F. LEV, ROBERT E. ALEXANDER, EARL R. CARPENTER and GLEN E. HUNTSBERGER, as Members of the Board of City Planning Commissioners of the City of Los Angeles; THE BOARD OF CITY PLANNING COMMISSIONERS OF THE CITY OF LOS ANGELES; LELAND S. WARBURTON, LLOYD G. DAVIES, J. WIN AUSTIN, HAROLD A. HENRY, GEORGE P. CRONK, L. E. TIMBERLAKE, CARL C. RASMUSSEN, CHARLES A. ALLEN, PARLEY PARKER CHRISTENSEN, G. VERNON BENNETT, HAROLD HARBY, E.D. J. DAVENPORT, JOHN E. RODEN, JOHN C. HOLLAND and GEORGE H. MOORE, as Members of the City Council of the City of Los Angeles; RAY L. CHESEBRO, City Attorney of the City of Los Angeles; DOE ONE, DOE TWO, DOE THREE, BOARD ONE, BOARD TWO, and BOARD THREE.

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California and Brief in Support Thereof.

ALBERT H. ALLEN,
HYMAN GOLDMAN,

9441 Wilshire Boulevard, Beverly Hills,
Attorneys for Petitioners.

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Petitioners,

v.

CITY OF LOS ANGELES, a Municipal Corporation; CHARLES E. BENNETT, Director of Planning of the Department of City Planning of the City of Los Angeles; WILLIAM H. SCHUCHARDT, S. P. LEV, ROBERT E. ALEXANDER, EARL R. CARPENTER and GLEN E. HUNTSBERGER, as Members of the Board of City Planning Commissioners of the City of Los Angeles; THE BOARD OF CITY PLANNING COMMISSIONERS OF THE CITY OF LOS ANGELES; LELAND S. WARBURTON, LLOYD G. DAVIES, J. WIN AUSTIN, HAROLD A. HENRY, GEORGE P. CRONK, L. E. TIMBERLAKE, CARL C. RASMUSSEN, CHARLES A. ALLEN, PARLEY PARKER CHRISTENSEN, G. VERNON BENNETT, HAROLD HARBY, ED. J. DAVENPORT, JOHN E. RODEN, JOHN C. HOLLAND and GEORGE H. MOORE, as Members of the City Council of the City of Los Angeles; RAY L. CHESEBRO, City Attorney of the City of Los Angeles; DOE ONE, DOE TWO, DOE THREE, BOARD ONE, BOARD TWO, and BOARD THREE,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF
CALIFORNIA.**

The petitioners, Charles C. Lockard, Ray Myre, W. E. Robertson, Matt Smith, J. L. King, M. J. Fielding, Harry Hirschberg, Paul Sherman, Electrical Engineering and Manufacturing Co., Samuel Braunstein, Walter G. Peter-

son, T. A. Sloper, D. Meyer, James Shepherd, Owen Hunt, Frank Bussjaeger, Max Schlom, Clarence Fox, Jacob R. Slaten and Thomas P. Walsh, pray that a Writ of Certiorari issue to the Supreme Court of the State of California to review the judgment of the Supreme Court of the State of California rendered in the above-entitled cause on February 1, 1949, the petition for rehearing of which was denied on February 28, 1949. The judgment of the Supreme Court of the State of California reversed the judgment of the Superior Court of the State of California in and for the County of Los Angeles rendered on the 17th day of April, 1947. The judgment of the Superior Court was affirmed by the District Court of Appeal, Division Two, on the 23rd day of April, 1948. The Superior Court, sitting without a jury, rendered its judgment, declaring invalid a zoning ordinance of the City of Los Angeles in so far as it pertained to petitioners' property and property similarly situated. The judgment of the trial court declared the ordinance as it applied to petitioners' property as invalid, arbitrary, discriminatory, confiscatory and that it deprived the parties of their property without due process of law and held that the ordinance in so far as it pertained to the petitioners' property was unconstitutional and void. The judgment enjoined the City of Los Angeles from enforcing the ordinance. The Supreme Court in its decision of February 1, 1949, reversed the judgment of the Superior Court, declaring the ordinance valid and constitutional.

Jurisdiction.

This court has jurisdiction under Title 28 of the United States Code Annotated, Section 1257, Subdivisions 2 and 3.

A certified transcript of the record in the case, including the proceedings in the Supreme Court of the State of California and the decision of that court and the dissent thereto, is furnished herewith and in compliance with Rule 38 of the rules of this court.

Summary of Statement of Matters Involved.

The petitioners were owners or lessees of certain parcels of property contained in a twelve-block strip on Jefferson Boulevard between Crenshaw and Vineyard in the City of Los Angeles and were using their properties for light industrial purposes. The City of Los Angeles, by its Ordinance No. 90500, which became effective on June 1, 1946, adopted a Comprehensive Zoning Plan whereby the entire city was divided into residential, commercial and industrial zones. The ordinance provided for various classes within the zones and among them a C-2 or commercial zone and an M-1 or light industrial zone. By this ordinance, a portion of Jefferson Boulevard (consisting of a twelve-block strip from Crenshaw Avenue west to Vineyard) was placed in a C-2 zone and a portion of Jefferson Boulevard (a twelve-block strip from Vineyard west to Cochran Avenue) was placed in an M-1 zone. Jefferson Boulevard is a continuous street and both strips of land are identical.

The property to the west of petitioners' property was zoned M-1 for light industrial use and petitioners sought to have their property, identical in nature, similarly zoned. Petitioners contended the only use to which their property could be put was light industrial. The City of Los Angeles refused to change the zone or to grant a zone variance and petitioners brought this action in the Superior Court, contending that the ordinance in so far as it applied to petitioners' property was discriminatory, confiscatory and unconstitutional; that it was depriving the petitioners of their property without due process of law in violation of Amendments V and XIV of the Constitution of the United States and Sections 1 and 14 of Article I of the Constitution of the State of California.

The trial court found the allegations of petitioners' complaint true and found that petitioners' property was suitable only for light manufacturing purposes such as was permitted in Zone M-1; that petitioners' property could not be used for commercial purposes; that the City of Los Angeles discriminated as to petitioners' property when it zoned said property C-2; that petitioners' property as C-2 had little or no value but had a great value if zoned M-1; that the City of Los Angeles, by refusing to permit petitioners to use their property for light industrial purposes, was depriving petitioners of their property without due process of law; that the City of Los Angeles had acted arbitrarily and that the ordinance in so far as it pertained to petitioners' property was unfair and unreasonable and that the City of Los Angeles should be enjoined from enforcing the ordinance.

Questions Presented.

Question 1. Does an appellate or reviewing court have the right to ignore the findings of fact of a trial court whether a zoning ordinance is unconstitutional as applied to petitioners' property when such findings of fact are made on conflicting evidence?

Question 2. Where a trial court makes findings of fact substantiated by the evidence that petitioners' property is suitable only for light industrial purposes, that the use of the property for light industrial purposes will not adversely affect the public health, welfare or morals, and that the property is practically valueless for commercial purposes, must not the court conclude as a matter of law from these findings that the ordinance as it affects petitioners' property is arbitrary, confiscatory, discriminatory and therefore unconstitutional and in violation of the United States Constitution, Amendments V and XIV, and Sections 1 and 14 of Article I of the Constitution of the State of California?

Question 3. Where a trial court determines on conflicting evidence that a zoning ordinance as it pertain to petitioners' property is arbitrary, discriminatory, confiscatory and oppressive and that the application of the ordinance has no reasonable relation to the public welfare and that the exercise of the police power is unreasonable and unwarranted and that the reasonableness of the ordinance is not fairly debatable, must not the Supreme Court as a matter of law conclude that the ordinance as applied to the petitioners' property is unconstitutional as being in violation of the United States Constitution, Amendments V and XIV, and the Constitution of the State of California, Sections 1 and 14 of Article I?

Question 4. Does a court have the right to determine whether the scheme of classification and districting is arbitrary or unreasonable and does the court have the power to set aside the decision of the zoning authorities if it finds that the regulations have no reasonable relation to the public welfare and that there has been an unreasonable, oppressive and unwarranted interference with property rights in the exercise of the police power?

Reasons Relied Upon for the Allowance of the Writ of Certiorari.

The discretionary power of this court is invoked upon the following grounds:

1. That the Supreme Court of the State of California has decided a question of substance relating to the Constitution of the United States and the rights guaranteed thereunder in violation of Amendments V and XIV of the Constitution of the United States.
2. That the Supreme Court of the State of California has decided a question of substance relating to the Constitution of the State of California and in violation of Section 1 and Section 14 of Article I of the Constitution of the State of California.
3. That the Supreme Court of the State of California has decided an important question of local law in a way in conflict with applicable local decisions.
4. That the Supreme Court of the State of California has decided an important question of general law in a way untenable and in conflict with the weight of authority.
5. That the Supreme Court of the State of California has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

6. That the Supreme Court of the State of California has decided a zoning case in conflict with other decisions in like matters in the State of California and at variance with the decisions of this court.

7. That in the past few years zoning has become a major problem in cities throughout the United States and various decisions of state courts, as well as this court, are in conflict with each other, many of these decisions using loose language, and it is necessary to have the law settled for the guidance not only of the courts in the various states, but of the various legislative bodies as to zoning rights and powers.

8. That the decision of the Supreme Court is a determination that the will of the legislature is supreme and is not subject to review by the courts regardless of the arbitrary and unreasonable character of such legislative will.

9. That Justice Carter of the Supreme Court of the State of California, in the dissenting opinion, concurred in by two other Justices, stated:

"I do not consider the holding of the majority decision the announcement of a rule of law, but that it simply amounts to a dogmatic declaration that in the zoning field the will of legislative body is supreme. This never has been and never should be, the law of this State."

10. That the dissenting opinion concurred in by three of the seven Justices of the Supreme Court of the States of California and the three Justices of the District Court of Appeal, determined that the rights of the petitioners were being abrogated in violation of the Constitution of the United States (Amendments V and XIV) and the Constitution of the State of California (Sections 1 and 14)

of Article I) and that the petitioners were being deprived of their property without compensation and without due process of law.

11. That the dissenting opinion of the Supreme Court of the State of California, in viewing the decision of the majority of that court, stated: "When such a thing occurs, I am constrained to question the soundness of the oft-repeated adage that 'ours is a government of law—not men.' "

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

ALBERT H. ALLEN,
HYMAN GOLDMAN,

Attorneys for Petitioners.

State of California, County of Los Angeles—ss.

Albert H. Allen, being duly sworn, deposes and says:
That he is the attorney for the petitioners herein, that he prepared the foregoing petition and that the allegations thereof are true, as he verily believes.

ALBERT H. ALLEN.

Subscribed and sworn to before me this 5th day of May, 1949.

LENORE HARRIS,

Notary Public in and for Said County and State.

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Respondents.

**BRIEF FOR PETITIONERS IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI.**

The Opinions of the Courts Below.

The opinion of the Supreme Court of the State of California was rendered on the 1st day of February, 1949, and was reported in 33 A. C. No. 14 (p. 427), 202 P. 2d 38, and appears in the record filed herewith at pages 159

to 179. The opinion of the District Court of Appeal of the State of California was rendered April 23, 1948, and is reported at 85 A. C. A. 202, 192 P. 2d 110, and it appears in the record filed herewith at page 155. The findings of fact and conclusions of law of the Superior Court are in the record, pages 30-44. It would appear that the Supreme Court of California reasoned that notwithstanding the trial court's findings of fact which were amply supported by the evidence that there was no debatable question it had the right to review the facts and reach its own conclusion that the question of the reasonableness of the ordinance was debatable; that therefore it would hold this ordinance valid since its validity was reasonably debatable.

Jurisdiction.

The grounds for jurisdiction are:

1. The judgment of the Supreme Court of the State of California was entered on February 1, 1949 [R. 159]. Petition for rehearing was denied February 28, 1949.
2. The judgment was rendered in a suit involving the constitutionality of a local ordinance which the Supreme Court by its decision held to be valid. It is contended that the ordinance is repugnant to the Constitution and the laws of the United States.
3. That the decision of the Supreme Court of the State of California deprives the petitioners of their property without due process of law and violates the rights, titles and privileges of the petitioners afforded them and guaranteed to them under the Constitution of the United States, Amendments V and XIV, and the Constitution of the State of California, Sections 1 and 14 of Article I.

(4) The statute under which the jurisdiction of this Court is invoked is Title 28, United States Code, Section 344.

5. The cases believed to sustain the jurisdiction are:

Chesebro v. Los Angeles County Flood Control Dist., 59 S. Ct. 622, 306 U. S. 459, 83 L. Ed. 921;

Senior v. Braden, 55 S. Ct. 800, 295 U. S. 422, 79 L. Ed. 1520;

O'Neill v. Lerner, 239 U. S. 244, 36 S. Ct. 54, 60 L. Ed. 249.

Statement.

The facts are stated in the petition, pages 3 and 4.

Statutes.

The statutes under which this case arises and which are necessary to be considered are as follows: The Comprehensive Zoning Ordinance of the City of Los Angeles, No. 77,000, No. 90,500 June 1, 1946; Amendments V and XIV of the Constitution of the United States; Sections 1 and 14 of Article I of the Constitution of the State of California.

Specification of Error.

The errors which petitioners will urge if the Writ of Certiorari is allowed are that the Supreme Court of the State of California erred:

1. In reversing the judgment of the Superior Court of the State of California as affirmed by the District Court of Appeal of the State of California.

2. In holding that the ordinance adopted by the City of Los Angeles as it affects petitioners' property is valid and in holding that the City of Los Angeles, by the exercise of its police power, had the right to restrict the petitioners from using their property for light industrial purposes.

3. In holding that the City of Los Angeles properly exercised its police power when it restricted the petitioners from the use of their property for light industrial purposes after the trial court found and held:

a. That the property could not be put to the commercial use to which the City of Los Angeles restricted its use;

b. That the property was practically worthless for the purpose to which it was restricted by the City of Los Angeles;

c. That prior to the zoning by the City of Los Angeles, the property was used almost completely for light industrial purposes and that the City of Los Angeles had granted temporary zoning variances permitting the property to be used for light industrial purposes;

d. That for a period of many years, little commercial usage had taken place in the district and that the primary use of the property was for light industrial purposes;

e. That the property has a land valuation for commercial purposes of \$30 per foot whereas for industrial purposes it has a valuation of \$200 per foot;

- f. That during the period the property has been zoned for commercial purposes, the land remained vacant and no development took place, whereas similar and identical land immediately adjoining the petitioners' property was zoned for industrial purposes and immediately developed;
 - g. That the property adjoining petitioners' property is identical in every respect to the property of petitioners and that the City of Los Angeles zoned the adjoining property for light industrial purposes but refused to similarly zone petitioners' property;
 - h. That the character and condition of the property had so changed from the original zoning as would make it unfair and inequitable to restrict the petitioners in the use of their property and that the use of petitioners' property for light industrial purposes would not be contrary to the health, welfare and morals of the public;
 - i. That the use of the property for light industrial purposes would not adversely affect the public health, welfare, safety or morals but, on the contrary, would enhance the public health, welfare, safety and morals;
 - j. That the property cannot be used for purposes other than light industrial purposes.
4. In failing to uphold the law established by the decisions of :

Skalko v. City of Sunnyvale, 14 Cal. 2d 213, 93 P. 2d 93, 94;

Jardine v. City of Pasadena, 199 Cal. 64, 248 Pac. 225, 48 A. L. R. 509;

In re Smith, 143 Cal. 368, 77 Pac. 180;
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58 Am. Jur. 954;
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194, 55 S. Ct. 187, 79 L. Ed. 281;
Polk Co. v. Glover, 305 U. S. 5, 59 S. Ct. 15, 83
L. Ed. 6.

5. In failing to grant petitioners' motion to receive additional evidence under Section 956a of the California Code of Civil Procedure.

Summary of Argument.

The points of the argument restate the reasons relied upon for the allowance of the Writ of Certiorari (pages 6 to 8, *supra*.)

ARGUMENT.

POINT I.

The Findings of Fact of a Trial Court on Conflicting Evidence Will Control on Appeal in Determining Whether a Zoning Ordinance Is Arbitrary, Unreasonable or Unconstitutional as Applied to the Respondents' Property.

The trial court came to the conclusion that to apply the ordinance to petitioner's property would render it practically worthless. It reached this conclusion after an examination of all of the physical facts, the character of the property involved, the nature of the surrounding territory, the use to which the various parcels of property in the district were being put, trends of development and possible future development of the property. It also examined maps, charts, diagrams, heard expert witnesses and made a personal inspection of the property and the surrounding territory.

The trial court reached the conclusion that the ordinance as applied to petitioners' property rendered the ordinance arbitrary, confiscatory, discriminatory and therefore unconstitutional. This ordinance was in violation of petitioners' property rights and in violation of the United States Constitution, Amendments V and XIV, and the Constitution of the State of California, Sections 1 and 14 of Article I.

The rule of law has been stated by this court time and time again. The Appellate and Supreme Courts of California as well as this court have repeatedly held that an appellate or reviewing court will not weigh conflicting evidence but will accept the trial court's findings of fact unless such findings are manifestly not supported by the evidence. This court has always considered the trial court

as best suited to determine factual questions involved in constitutional law issues and has stated that it will be guided by the findings of the trial court. See:

- Chastleton Corporation v. Sinclair*, 264 U. S. 543, 44 S. Ct. 405, 68 L. Ed. 841;
- City of Hammond v. Schappi Bus Line*, 275 U. S. 164, 48 S. Ct. 66, 72 L. Ed. 218;
- Borden's Farm Products Co. v. Baldwin*, 293 U. E. 194, 55 S. Ct. 187, 79 L. Ed. 281;
- Polk Co. v. Glover*, 305 U. S. 5, 59 S. Ct. 15, 83 L. Ed. 6;
- 49 Harv. L. Rev. 631;
- 38 Harv. L. Rev. 6;
- 21 Am. Bar Assn. J. 805.

Zoning cases are no exception to this universal rule of law and an examination of the cases on zoning and even those cited by the Supreme Court of the State of California in the majority opinion do not hold to the contrary. (*Skalko v. City of Sunnyvale*, 14 Cal. 2d 213, 93 P. 2d 93, 94 and *Jardine v. City of Pasadena*, 199 Cal. 64, 248 Pac. 225, 48 A. L. R. 509.) In the *Skalko* case the court held:

“The question, therefore, is whether under the facts shown by the appellant his rights are now being invaded by the existence and maintenance of the ordinance.”

It has always been the law that before an appellate tribunal will reverse a judgment it must appear from the record, that accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears

that the law precludes the prevailing party from recovering a judgment.

Macaulay v. Booth (1942), 53 Cal. App. 2d 757, 128 P. 2d 386;

Field v. Mollison (1942), 50 Cal. App. 2d 585, 123 P. 2d 603.

On appeal all conflicts in the evidence and doubts as to the sufficiency thereof must be resolved in favor of the respondent and all legitimate and reasonable inferences indulged to uphold the findings.

Bristol Estate (1943), 23 Cal. 2d 221, 143 P. 2d 689.

It is respectfully submitted that the rule of law as stated by this court in the *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 71 L. Ed. 303, is to the effect that an appellate court will search the record to determine whether the findings are supported by any evidence. If the findings of the trial court are supported by any evidence in the record and if those findings indicate that the application of the zoning ordinance to the property in question is arbitrary and discriminatory, then the ordinance will be held to be unconstitutional. This basic question remains the same in all cases including zoning cases. The question therefor is as stated in *Skalko v. City of Sunnyvale, supra*:

“The question, therefore, is whether under the facts shown by the appellant, his rights are now being invaded by the existence and maintenance of the ordinance.” (Italics ours.)

Given the facts as they appear in the trial court's findings, the question on appeal is, whether under such facts the zoning ordinance is unreasonable, arbitrary and discriminatory and therefore unconstitutional as applied to the petitioner's property.

POINT II.

Where a Trial Court Determines on Conflicting Evidence That a Zoning Ordinance as It Pertains to Petitioners' Property Is Arbitrary, Discriminatory, Confiscatory and Oppressive, and That the Application of the Ordinance Has No Reasonable Relation to the Public Welfare and That the Exercise of the Police Power Is Unreasonable and Unwarranted and Reaches the Conclusion That the Reasonableness of the Ordinance Is Not Fairly Debatable, the Appellate or Reviewing Court Must Conclude as a Matter of Law That the Ordinance as Applied to Petitioners' Property Is Unconstitutional.

The trial court made certain basic findings of fact and these were amply substantiated by the evidence. It found:

- A. That the property could not be put to the commercial use to which the City of Los Angeles restricted its use;
- B. That the property was practically worthless for the purpose to which it was restricted by the City of Los Angeles;
- C. That prior to the zoning by the City of Los Angeles, the property was used almost completely for light industrial purposes and that the City of Los Angeles had granted temporary zoning variances permitting the property to be used for light industrial purposes;
- D. That for a period of many years, little commercial usage had taken place in the district and that the primary use of the property was for light industrial purposes;

- E. That the property has a land valuation for commercial purposes of \$30.00 per foot whereas for industrial purposes it has a valuation of \$200.00 per foot;
- F. That during the period the property has been zoned for commercial purposes, the land remained vacant and no development took place, whereas similar and identical land immediately adjoining the petitioners' property was zoned for industrial purposes and immediately developed;
- G. That the property adjoining petitioners' property is identical in every respect to the property of petitioners and that the City of Los Angeles zoned the adjoining property for light industrial purposes but refused to similarly zone petitioners' property;
- H. That the character and condition of the property had so changed from the original zoning as would make it unfair and inequitable to restrict the petitioners in the use of their property and that the use of petitioners' property for light industrial purposes would not be contrary to the health, welfare and morals of the public;
- I. That the use of the property for light industrial purposes would not adversely affect the public health, welfare, safety or morals but, on the contrary, would enhance the public health, welfare, safety and morals;
- J. That the property cannot be used for purposes other than light industrial purposes.

From these basic findings the trial court concluded that the exercise of the police power was unreasonable and therefore arbitrary, discriminatory and was a deprivation of the petitioners' property rights. It is the province of the trial court to determine issues of fact and the trial court reached the conclusion that the reasonableness of the ordinance was not fairly debatable. This finding of fact is binding on the appellate court. The evidence fully sustained the findings of the trial court that to apply the ordinance to plaintiff's property would render it practically worthless and this finding of fact is binding on the appellate or reviewing court.

In re Smith, 143 Cal. 368, 77 Pac. 180;

Pacific Palisades Assn. v. Huntington Beach, 196 Cal. 211, 237 Pac. 538, 40 A. L. R. 782;

People v. Hawley, 207 Cal. 395, 279 Pac. 136;

Skalko v. City of Sunnyvale, 14 Cal. 2d 213, 93 P. 2d 93;

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322, 28 A. L. R. 1321; 12 Cal. Jur., Supp., p. 164;

58 Am. Jur., p. 954;

Jardine v. City of Pasadena, 199 Cal. 64, 248 Pac. 225, 48 A. L. R. 509;

Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 175 P. 2d 542;

Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479.

POINT III.

The Court Has the Right to Determine Whether the Scheme of Classifications and Districting Is Arbitrary or Unreasonable and Has the Power to Set Aside the Decision of Zoning Authorities if It Finds That the Regulations Have No Reasonable Relation to the Public Welfare and That There Has Been an Unreasonable, Oppressive and Unwarranted Interference With Property Rights in the Exercise of the Police Power.

It is respectfully submitted that the court has the right to determine whether the exercise of the police power is arbitrary or unreasonable and this power lies in the trial court. To hold otherwise is tantamount to saying that the so-called legislative determination is conclusive and may not be reviewed by the courts regardless of the arbitrary and unreasonable character of such determination.

The basic concept in both the Constitution of the United States Amendments V and XIV, and the Constitution of the State of California, Sections 1 and 14 of Article I is that the ownership and occupancy of land are fundamental rights to be enjoyed by all citizens of the United States, and with the exception of the limited field in which the police power operates, these rights cannot be violated without compensation being paid to the owner. It is conceded that the exercise of the police power must be reasonable, but it is urged that the determination of whether or not it is unreasonable is for the trial court. When a trial court reaches the determination that an ordinance is unreason-

able and arbitrary and this determination is amply substantiated by the evidence, such determination is binding on the appellate court.

The ruling of the Supreme Court of California amounts in fact to a determination and the announcement of a rule of law and a dogmatic declaration that in the zoning field the will of the legislative body is supreme. As stated by Justice Carter in his dissenting opinion, "*This never has been and never should be the law of the State of California and is certainly in violation of every concept of law as enunciated by this court.*" (Italics ours.)

To hold otherwise would be to take away from the trial court all of its functions and would relegate the trial court to that of a mere referee to hear the evidence and make its recommendation to the appellate or reviewing court which would have no binding effect as a factual determination. This has never been and is not now the law. The effect of the majority decision of the Supreme Court is to hold that in zoning cases the determination of the reasonableness of the ordinance is not binding on the appellate court. If the appellate court believes that the question is debatable it may disregard the findings of fact made by the trial court. This is not the law. The only time a reviewing court can look behind the findings of the trial court is if the findings of the trial court are not supported by the evidence.

The reviewing court can only look to see if the trial court's determination that the reasonableness of the ordinance was not debatable and that reasonable minds would

not differ was supported by the evidence. It is respectfully submitted that to hold otherwise would make the legislature's decision conclusive in all cases and deprive the courts of their power and duty to review discriminatory, arbitrary and unconstitutional legislation. There will never be a case where experts called as witnesses for opposing parties will not differ. The fact that experts will differ does not mean that the proposition is debatable.

In cases involving the reformation of contracts, the language usually states that the evidence must be "clear, convincing and positive," "free from reasonable doubt" or "fully establish the facts." It must be assumed that the trial court followed these rules in arriving at its findings of fact and the appellate court should not go behind the findings to weigh the evidence.

Ford v. Ford, 44 Cal. App. 415, 186 Pac. 164;

Cox v. Woods, 67 Cal. 317, 7 Pac. 722;

Bismo v. Herzberg (1946), 75 Cal. App. 2d 25,
170 P. 2d 973;

Tomas v. Vaughn (1944), 63 Cal. App. 2d 188,
146 P. 2d 499;

Home & Farm Co. of Calif. v. Freitas, 153 Cal.
680, 96 Pac. 308.

POINT IV.

Petitioners' Motion to Receive Additional Evidence Under California Code of Civil Procedure, Section 956(a), Should Have Been Granted by the California Supreme Court.

Petitioners submitted a motion to the California Supreme Court requesting that it receive additional evidence under California Code of Civil Procedure, Section 956(a), on the ground that since the trial of the action, the property in question has further developed solely for industrial purposes and not for commercial use. The new industrial uses were shown by fifteen photographs which were appended to the motion and offered in support thereof. These photographs showed that the further development of the area in question consisted of the construction of new buildings which obviously could be used only for industrial purposes. (See photographs submitted with motion to receive additional evidence certified by Clerk of California Supreme Court.)

In 1926 the Constitution of the State of California was amended by adding Section 4 $\frac{3}{4}$ to Article VI which enabled the legislature to enact Section 956(a) of the Code of Civil Procedure. This section provides that appellate courts may receive additional evidence

". . . concerning facts occurring at any time prior to the decision of the appeal and may give or direct the entry of any judgment or order and make such further or other order as the case may require. This section shall be liberally construed to the end, among

other things, that wherever possible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court, except where the interest of justice requires a new trial."

This code section is particularly applicable to cases involving zoning regulations in view of the fact that the future development of the property is of great importance in determining the proper classification thereof.

See:

Sunny Slope Water Co. v. City of Pasadena, 1 Cal. 2d 87, 93, 33 P. 2d 672.

It is respectfully submitted that the fifteen photographs offered in support of petitioners' motion before the California Supreme Court additionally bore out the wisdom of the settled rule of law that the trial court's findings of fact should control on appeal though the findings are based on conflicting evidence. Admittedly there is substantial evidence to support the findings of fact of the trial court in the instant case. Further, California Code of Civil Procedure, Section 956(a), in no way detracts from the settled rule of law that the trial court's findings shall control when based upon conflicting evidence.

See:

Isenberg v. Sherman, 212 Cal. 454, 298 Pac. 1004, 299 Pac. 528.

Conclusion.

The trial court made extensive and detailed findings of fact on conflicting evidence that the property involved was suitable only for light industrial purposes and was practically worthless for commercial use. The court then concluded as a matter of law from these basic facts that the ordinance was so unreasonable and arbitrary as to be unconstitutional and in violation of the United States Constitution, Amendments V and XIV, and the Constitution of the State of California, Sections 1 and 14 of Article I. It is conceded that whether an ordinance is so unreasonable and arbitrary as to be unconstitutional is a question of law but the basic facts upon which the conclusion is based are for the trial court to determine.

It is a matter of great public interest to have this Honorable Court take jurisdiction of the case at bar as a guide to communities throughout the country in the matter of the exercise of their police powers in making zoning regulations. In addition, property owners throughout the country require clarification of their rights under varied and complicated zoning ordinances and regulations. This field of legislation was practically non-existent less than fifty years ago and presently nearly all owners of urban property are effected by zoning ordinances and regulations. It is respectfully submitted that the Petition for Certiorari should be granted and the issues involved determined by this Court.

Respectfully submitted,

ALBERT H. ALLEN,
HYMAN GOLDMAN,

Attorneys for Petitioners.

